United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original with Affidavit of Mailing

76-1198

To be argued by
JONATHAN M. MARKS

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1198

UNITED STATES OF AMERICA,
Appellee,

—*against*—

DAVID GRANT,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

KENNETH J. KAPLAN,
JONATHAN M. MARKS,
Assistant United States Attorneys,
Of Counsel.

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—against—

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Appellant.

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Preliminary Statement

Appellant appeals from a judgment of conviction in the United States District Court for the Eastern District of New York (Costantino, *J.*) entered on April 13, 1976, after trial before a jury, which convicted him of armed bank robbery (18 U.S.C., § 2113(d)). Appellant was sentenced to a term of fifteen years imprisonment, a sentence which he is presently serving.

On appeal, appellant does not challenge the sufficiency of the evidence. His sole claim is that the Court's failure to grant the defense request for a fingerprint expert was error requiring reversal.

Statement of Facts

The evidence showed that on October 10, 1975, the appellant, his brother-in-law Michael Reed, and a third man known only as "Henry", entered a branch of the Chase Manhattan Bank, 217-01 Linden Boulevard, Cambria Heights, New York, with loaded guns.[1] Appellant was carrying a loaded handgun, Reed had a shotgun, and Henry carried a rifle (Tr. 85, 87, 91-92).[2] Appellant vaulted the tellers' counter and took approximately $3,250.00 in bank funds from the tellers at gunpoint. Appellant and his accomplices then left the bank and went to the nearby apartment of Reed's friend, Ronald Freeman, to divide the proceeds (Tr. 103-105, 222-224).

Michael Reed testified for the Government. He testified that he had known appellant, his brother-in-law, for about nine years (Tr. 81). On the morning of October 10, 1975, Reed went to appellant's apartment in Queens, and the two of them agreed to rob a bank (Tr. 84). They left the apartment with a rifle for Reed and a .38 calibre pistol for appellant and drove to Brooklyn to pick up "Henry", who had a shotgun with him (Tr. 85-86, 97). The three then drove to Ronald Freeman's apartment, which was three or four blocks from the bank (Tr. 88-90, 104). Reed asked Freeman to stay at home for a while, and Freeman agreed (*Id.*). Appellant, Reed and Henry then walked to the bank and entered with their weapons loaded (Tr. 93). Reed covered the officers' platform, Henry covered the bank floor from a position near the door, and appellant vaulted the tellers' counter (Tr. 93, 102). Appellant took approximately $3250.00 from the tellers at gunpoint, and the robbers then left the bank (Tr. 102-103, 63). All three had their faces covered

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[1] "Henry" has never been identified.

[2] References are to the transcript.

during the robbery (Tr. 99). Appellant and his accomplices then went back to Freeman's house where they divided the money (Tr. 104).

The Government also called Ronald Freeman. He testified that he met appellant through Reed (Tr. 218). On the day of the robbery, Reed, appellant, and a third man he had never seen before came to his house with guns (Tr. 219). Reed told Freeman they were going to do a stickup (Tr. 220). About fifteen minutes later they came back with a bag full of money. They divided the money, changed their clothes and left the guns and $150 in quarters behind in Freeman's apartment (Tr. 224-226). Shortly after the robbers left, the police came to Freeman's apartment. Thereafter, Freeman showed the weapons to the FBI and made a statement implicating Reed and appellant (Tr. 227, 229-230).

Two bank employees, Charles Tolbert and Margaret Pickett, also testified. They described the robbery and identified the place where appellant vaulted the counter and grabbed the partition with his hand (Tr. 28-29, 48-49).[3] They could not identify any of the robbers, each of whom wore something covering his face (Tr. 33-36, 54).

An FBI agent, David Russell, testified that shortly after the robbery he lifted a latent fingerprint from the top of the glass partition in front of the tellers' cage in the same place where the bank employees had said the bank robber vaulted the counter (Tr. 175-179). John C. Saunders, a fingerprint expert with over 18 years experience, attached to the FBI laboratory in Washington, testified for the Government. He has made several million fingerprint comparisons. Agent Saunders compared the latent lift taken by Agent Russell with appellant's

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[3] The partition is wiped clean every night (Tr. 66).

ink prints and concluded that the latent print was made by appellant's left thumb based on fourteen points of identity (190-191, 198).

Appellant did not put on a defense.

ARGUMENT

The district court's denial of appellant's request for appointment of a fingerprint expert under the Criminal Justice Act was not an abuse of discretion.

Appellant's sole contention on appeal is that the district court erred in denying appellant's request for the appointment of a fingerprint expert under the Criminal Justice Act (18 U.S.C. § 3006A(e)). The court was well within its sound discretion in denying this request.

Section 3006A(e) does not provide for the appointment of experts as a matter of right. The appointment of services other than counsel is a matter of discretion. "The statute is not self-executing and clearly calls for a judicial determination on the necessity for the services." *United States* v. *Tate*, 419 F.2d 131, 132 (6th Cir. 1969).

Section 3006A(e) does not provide a test as to when the appointment of services is required. The most widely-cited analysis of the section is Judge Wisdom's concurring opinion in *United States* v. *Theriault*, 440 F.2d 713, 716-717 (5th Cir. 1971). There, Judge Wisdom suggested that authorization for the appointment of expert services is required "when the attorney makes a reasonable request in circumstances in which he would independently engage such services if his client had the

financial means to support his defenses." 440 F.2d at 717. Judge Wisdom continued:

> I do not mean to suggest that the trial court should grant such requests automatically . . . . Nor should the trial judge authorize an obviously frivolous expenditure by the defendant.

Id.

The Ninth Circuit, citing *Theriault* with approval, has articulated the following test:

> The statute requires the district judge to authorize defense services when the defense attorney makes a timely request in circumstances in which a reasonable attorney would engage such services for a client having the independent financial means to pay for them.

United States v. *Bass*, 477 F.2d 723, 725 (9th Cir. 1975).

In applying the test to the very issue presented here, the Court of Appeals for the Third Circuit upheld the trial judge's denial of defense counsel's request for a fingerprint expert. *United States* v. *Carney*, 328 F. Supp. 966, 967-969 (D. Del. 1971), *aff'd*, 455 F.2d 925 (3d Cir. 1972). The facts of this case require the same result.

In determining whether a request for services should be granted, a primary factor to be considered is whether the claim in support of which the services are requested is likely to prevail. Thus, in *United States* v. *Chavis*, 476 F.2d 1137 (D.C. Cir. 1973), a case relied upon by appellant, the defendant requested the appointment of a psychiatrist in support of his defense of insanity. The court observed that "[o]bviously, a court should not be required to appoint a psychiatrist if there

is absolutely no reason to think that such a plea would be successful", 476 F.2d at 1143.[4] Qualified fingerprint experts seldom if ever disagree on fingerprint comparisons. Moenssens, Moses and Inbau, *Scientific Evidence in Criminal Cases* 345 (Foundation Press 1973). In this respect, they differ greatly from psychiatrists, who frequently disagree on questions within their area of competence.

Appellant's trial counsel made no showing that the appointment of a fingerprint expert would have served any useful purpose. It was in this context that the court ruled on appellant's request. There was absolutely no reason to think that the claim that the latent fingerprint was not appellant's would succeed. Accordingly, the reasoning of the *Chavis* court militates in favor of denying appellant's request. A "fishing expedition" is not a legitimate purpose for the appointment of an expert under § 3006A(e). *United States* v. *Schultz*, 431 F.2d 907, 911 (8th Cir. 1970).

In *Schultz*, the Eighth Circuit Court of Appeals formulated the following standard:

> While a trial court need not authorize an expenditure under subdivision (e) for a mere "fishing expedition", it should not withhold its authority when underlying facts reasonably suggest that further exploration may prove beneficial to the accused in the development of a defense to the charges.

431 F.2d at 911.

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[4] Under the circumstances of that case, the Court of Appeals held that the district court had abused its discretion in denying the request for a psychiatrist.

Here, there were no facts adduced which suggested that further exploration might prove beneficial or that the appointment of a fingerprint expert under the Criminal Justice Act would reasonably aid the defense. This is so in light of the powerful evidence against appellant apart from his fingerprint.

Moreover, the appointment of a defense fingerprint expert here would not only be a "frivolous expenditure" within the meaning of *Theriault*, it might be strategically foolish. For the report of such an expert, which experience suggests in all probability would have supported the Government expert, would have been available to the prosecution, and the prosecution could then call the expert as its own witness. F. R. Crim. P. 16(b). Furthermore, if appellant chose to call such an expert to establish, for example, what had already been conceded by the FBI expert—that the age of a fingerprint cannot be determined with certainty—the Assistant U.S. Attorney could have elicited on cross-examination the expert's opinion that the fingerprint was indeed appellant's. Finally, by calling his own fingerprint expert, appellant would focus attention on the fingerprint—something no reasonable defense lawyer would do.

Appellant rests his argument on a string of cases involving the appointment of psychiatrists and related psychiatric services where a colorable defense of insanity was raised. *United States* v. *Schultz*, 431 F.2d 907 (8th Cir. 1970); *Brinkley* v. *United States*, 498 F.2d 505 (8th Cir. 1973); *United States* v. *Schappel*, 445 F.2d 716 (D.C. Cir. 1971); *United States* v. *Edwards*, 488 F.2d 1154 5th Cir. 1974); *United States* v. *Taylor*, 437 F.2d 371 (5th Cir. 1971); *United States* v. *Tate*, 419 F.2d 131 (6th Cir. 1969); *United States* v. *Hartfield*, 515 F.2d 254 (9th Cir. 1975); and *United States* v. *Chavis*, 476 F.2d 1137 and 486 F.2d 1290 (D.C. Cir. 1973).

In all of the cases on which appellant relies, the claim of insanity was substantial and the appointment of a psychiatrist or authorization of psychiatric services was essential to the establishment of the claim.[5] Here the mere possibility that the latent fingerprint was not appellant's did not even rise to the level of suspicion. On that ground alone, the facts presented here distinguish this case from those relied upon by appellant. Significantly, appellant cites not a single case in which the defense called its own expert to refute fingerprint evidence proffered by the prosecution.

In sum, in light of the overwhelming evidence of appellant's guilt presented in the instant case, the appointment of a fingerprint expert was not "necessary" within the meaning of Section 3006A(e), and the district court acted within its discretion in denying the request.

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[5] *United States* v. *Henderson*, 525 F.2d 247 (5th Cir. 1975) cited by appellant is equally inapposite. There a panel of the Fifth Circuit held that appellants were entitled to the transcript of a state court trial in which they were acquitted relating to the very transaction which gave rise to the federal indictment.

CONCLUSION

The judgment of conviction should be affirmed.

September 20, 1976.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

LYDIA FERNANDEZ, being duly sworn, says that on the 23rd day of September, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a two copies of the Brief for the Appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Phylis Skloot Bamberger, Esq.
The Legal Aid Society
Federal Defender Services Unit
509 U. S. Courthouse
Foley Square, New York, N. Y. 10007

Sworn to before me this
23rd day of September, 1976

Carolyn N. Johnson

CAROLYN N. JOHNSON
[illegible]
Term Expires March 30, 197[illegible]

Lydia Fernandez

LYDIA FERNANDEZ